IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, (a corporation), *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 11,781 No. 11,782
THE CHRONICLE PUBLISHING COMPANY (a corporation), *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 11,783 No. 11,784

BRIEF OF NEWSPAPER & PERIODICAL VENDORS & DISTRIBUTORS UNION, LOCAL NO. 468, OF INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS UNION OF NORTH AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION.

Leave having been granted by this Court, Newspaper & Periodical Vendors & Distributors Union, Local No. 468, a local union under the International Printing Pressmen & Assistants Union of North

America, respectfully submits this brief in support of the appeals of the Appellants. The relevant evidence and the legal effect thereof are set forth in the brief of the Appellants, and the Union will not duplicate that discussion. By means of this brief the Union will attempt to emphasize its contention that the relationship of the members of the Union to the Publishers, as established by the contracts of the parties, should be upheld by the Court and adjudged to be what it was intended and written to be by the parties, to-wit that of buyers and sellers,—an independent contractor relationship.

CLASSIFICATION OF THE VENDORS AS EMPLOYEES THREATENS TO DEPRIVE THEM OF SUBSTANTIAL GAINS WHICH THEY HAVE ACHIEVED AS INDEPENDENT CONTRACTORS.

The evidence and the findings as set forth in the brief of Appellants show that throughout the period of five successive contracts between the Union and the Publishers, commencing in 1937, the parties have dealt on the basis that the relationship between the members of the Union and the Publishers is that of buyers and sellers. In other words, as between the parties themselves, the status of the vendors had become firmly settled through negotiations and contracts, as had other matters which the parties had embodied in their contracts, upon the basis that the contracts provided for the vendors being independent contractors. Operating under such contracts the vendors have been free from the directions of the Publishers, many of them have dealt in other wares

and other publications while also selling those of the Publishers, and have established sound businesses and good incomes through the use of their initiative. Their only contact with the Publishers has been through the latter's wholesaler, and the wholesaler's sole province is to sell newspapers to the vendors and to collect the sales price.

The effort of the government to negative a basic provision of the contract between the Publishers and the vendors has created a serious practical problem for the vendors. A final decision in this case denying recognition of the status of the vendors as buyers and independent contractors, is quite likely to result in a new appraisal of their status by the Publishers, by other federal and state agencies, and by other persons, with respect to many of the rights and claims which the vendors have established or asserted.

It is a matter of common knowledge and is also shown by the evidence which was presented, that a great many of the vendors are aged and handicapped persons. The evidence also showed that the first buyer-seller contract procured by the vendors contained a provision for guaranteed minimum profits to each vendor of $15 per week; that succeeding contracts raised the guaranteed minimum to $37.50 per week and that the great majority of the vendors actually earned profits in excess of the guaranteed minimum, some between $75 and $100 per week. It is the judgment of the vendors, based upon their long experience, that if they are classified as employees they will be unable to maintain the economic gains

which have followed from their recognition as independent contractors, or to attain additional objectives which they are seeking. The weapon of a strike, which is the ultimate means by which employees attempt to attain their ends, has not been used by the vendors and in a realistic sense never was and is not now physically available to such a handicapped group of persons. They have utilized, and from practical necessity must continue to utilize, the procedure of arbitration and other legal procedures as the means by which they seek to maintain and better their incomes. Their rights to vend other publications and additional wares, to retain the full difference between the wholesale and retail prices of newspapers, to remain at a particular business location without being subject to change at the hands of the Publishers, and many other rights, are certain to receive different and less favorable consideration, both in negotiations with the Publishers and before arbitrators, in the event that the vendors are viewed as employees rather than as buyers and independent contractors. And it is extremely unrealistic for the government to urge, as it does, that a decision that the vendors are employees within the purview of social security legislation does not infringe upon their right to contract as independent contractors for other purposes. A decision in this case that the vendors are employees is very likely to be followed by attempted changes in the rights of the vendors all along the line, because many of the rights and benefits of the vendors are based upon their present recognized status as buyers and independent contractors.

Thus, it can be seen that the vendors base their opposition to the government's attempt to interfere with their contractual status as independent contractors on what the vendors earnestly believe to be best for their self-interest. The rulings of the Bureau of Internal Revenue and of the Trial Court, if permitted to stand, constitute an ever-present threat to the present and real security which the men now enjoy: The arrangements and incomes which they have attained through their contracts are such that the accrual of a surplus of employees in the labor market may result in competition for locations and cancellation of some contracts, particularly the contracts of the most physically handicapped vendors, if vendors are held to be subject to the burdens and restrictive rights of an employer-employee relationship with the Publishers. At the very least only the very best of the men would be retained, some corners where they do business would be consolidated, other corners eliminated, and, as to the men who are retained, set wages might well be substituted for the more lucrative profits that they now earn, particularly with respect to the heavily sold Sunday editions of the newspapers. In the judgment of the men themselves, other disadvantageous changes in their present set-up would be likely to follow.

The problem of the vendors is not a theoretical one, and is not materially solved by the limited aid provided by the Social Security Laws. It is a problem of maintaining a present, daily security, and is approached by the vendors in a practical and realistic manner, based upon long experience and giving care-

ful consideration to the relative advantages and disadvantages of a rule that would change their present status as independent contractors to that of employees. Their experience has traversed the terms of five successive contracts predicated upon a buyer-seller relationship. It has taught them that as independent contractors they are certain to continue to fare better and to improve their incomes and security, and that it is necessary that they exert every effort to prevent the present attempt to change their status to that of employees.

THE SOCIAL SECURITY ACT SHOULD NOT BE CONSTRUED TO APPLY TO THE VENDORS.

The vendors realize that in the final analysis the question at bar turns upon the scope of the language used by the Congress in enacting the statute. But viewed from that standpoint, it is clear that the Congress did not frame the law so as to bar deliberately worked out relationships in which both parties have made it an essential point of their contract that their relationship shall be that of buyer and seller and an independent contractor relationship. The regulations, the administrative rulings, and the decisions applying the statute, as set forth in the brief of Appellants, all join in showing that Congress did not attempt to rewrite or refuse to recognize an independent contractor relationship which is created by all of the parties to a contract. Therefore, since the parties to the present contracts intended and in good faith bargained to create a relationship which is outside of the

scope of the statute, that intent and the provisions of the contracts should be given effect in the face of the attempt of the government to have the relationship construed otherwise than as the parties intended and wrote it. Small though he may be as compared with most legally recognized independent contractors, a vendor should not be denied the opportunities and self-respect which attend independent operators. In making their contracts, the Union on behalf of its members on one side, and the Appellants on the other side, evaluated the advantages and disadvantages of the relationship of independent contractors as compared with that of employees and took into consideration the relative value of social security, workmen's compensation and other incidents of employment. Since the evidence shows such process of evaluation throughout the terms of five successive contracts and a careful regard by the members of the Union for their own self-interest, and since it should be assumed that they are well advised by experience as to whether their self-interest is best promoted by maintaining their independent contractor status, such conclusions should be respected where, as here, the statute does not compel a contrary conclusion.

Dated, San Francisco,
March 1, 1948.

Respectfully submitted,

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